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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1498

REESE HUBBARD,

*Petitioner,*

*vs.*

DONNA M. KIEFEL,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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## PETIION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner, Reese Hubbard, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in cases 15976, and 18157 (Consolidated).

### CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the District Court (A. 35-41) is reported in 39 F. R. D. 592-596 and is printed in Appendix "B", pp. A. 11-A. 18.*

The opinion of the United States Court of Appeals for the Seventh Circuit on the first appeal is printed in Appendix "B", hereto, pp. A. 19-36, and is reported in 404 F. 2d 1163-1172.

The opinion of the Court of Appeals on the second appeal is printed at pp. A. 39-42.

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* The reference "A." throughout this petition is to our separately-bound Appendix.

## JURISDICTION.

The judgment of the Court of Appeals on the second appeal was entered on December 23, 1970. (A. 39.)

The judgment on the first appeal was entered on November 15, 1968. (A. 19.) Rehearing timely sought was denied on January 6, 1969.*

An uncontested motion for a stay of mandate was denied by the Court of Appeals on January 20, 1971, but allowed by Justice Thurgood Marshall on February 5, 1971.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

## QUESTIONS PRESENTED.

1. May a federal judge, long after the trial of a civil case, summarily punish a trial lawyer for "objectionable trial strategy" through a substantial judgment, under the guise of "costs," without according that lawyer an evidentiary hearing as to disputed factual issues?
2. Can 18 U. S. C., § 1927, be extended to authorize such a procedure?
3. Under *Mayberry* v. *Pennsylvania*, No. 121, 39 L. W. 4133, was not the trial court required to refer plaintiff's motion for "costs" and "attorneys' fees," to

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* NOTE: Following the first appeal, certiorari was sought unsuccessfully at that interlocutory stage of these proceedings. *Cert. den.* 395 U. S. 908.

We have filed the petition in the recognition that this Court has often denied certiorari at an interlocutory stage of proceedings, but later granted it, to review the entire proceedings, when ultimately there was a final judgment. See, *e.g. Burnet* v. *J. Rogers Flannery & Co.*, 286 U. S. 524, 52 S. Ct. 497, 76 L. Ed. 1268, *reversing*, 3 Cir., 54 F. 2d 365; *Mercer* v. *Theriot*, 377 U. S. 152, 153-154, 12 L. Ed. 206, 208, 84 S. Ct. 1157 (1964); *Stern & Gressman*, Supreme Court Practice (4th ed. 1967), p. 27.

another judge because of the "marked personal feelings" of the court toward petitioner, which had already prompted him to decline to retry the case?

4. Is not a lawyer, accused of misconduct during the trial of a lawsuit, entitled as a matter of fairness, and due process, to:
   (a) advance notice of the charges to be defended;
   (b) an opportunity to confront and cross-examine his accusers;
   (c) an opportunity to present evidence corroborative of his factual statements made during trial, and
   (d) specific findings of fact and conclusions of law which would structure the issues on appeal?

5. Were not petitioner's rights violated, although the proceeding was called costs, rather than contempt?

6. Does 28 U. S. C. § 1927 create a new category of taxable "costs," or does that section simply shift to an attorney the burden of paying such items of "costs" as might otherwise be taxed to the client?

7. Does any other rule or statute permit taxation of attorneys' fees on appeal as costs? Or, does the policy of *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967), extend to attorneys' fees on appeal?

8. Was it not error, and a denial of due process, to receive opinions from several past cases, in which petitioner was not a party, as evidence of "objectionable trial strategy"? Did not the Court of Appeals compound that error by basing its decision on matter which was neither urged to, nor relied on by the trial court?

Is such a change of theory at the review level constitutionally permissible?

9. Does not this entire proceeding to punish a lawyer summarily effectively nullify a statute especially enacted to protect the independence of the bar? 18 U. S. C. § 401; Rule 42, F. R. Cr. P.

Are not the courts bound by the strong public policy of that statute, which was intended as the only way to punish a trial lawyer?

## STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED.

The following statutory provisions, reprinted in Appendix A., pp. 6-9 are involved: 18 U. S. C. A. § 401 (p. A. 6); 18 U. S. C. A. § 1503 (pp. A. 6-7); 28 U. S. C. A. § 1912 (p. A. 7); 28 U. S. C. A. § 1913 (p. A. 7); 28 U. S. C. A. § 1920 (pp. A. 7-8); 28 U. S. C. A. § 1923 (p. A. 8); 28 U. S. C. A. § 1927 (p. A. 9)

Amendment VI (p. A. 9); Amendment VII (p. A. 9); and Amendment V (p. A. 10) to the United States Constitution are involved.

Rules 30 (pp. A. 1-2); 43 (p. A. 2); 52 (pp. A-2-3); 61 (p. A. 3) of the Federal Rules of Civil Procedure are involved. Rule 42 (p. A. 4) of the Federal Rules of Criminal Procedure is involved. Rule 39 (a, c, d, e) of the Federal Rules of Appellate Procedure (pp. A. 4-5) is involved.

## STATEMENT OF THE CASE.

Petitioner was defense counsel is a personal injury suit which was tried twice in U. S. District Court for the Northern District of Illinois.

The district court had jurisdiction by reason of diversity of citizenship.

The first time, in November, 1965, there was a verdict of not guilty. The second time, in January, 1967, there was a verdict of $100,000. (A. 19-36.)

The two trials were before different judges ((1) Robson, and (2) Decker). The second trial resulted because the first trial judge (in February, 1966) granted a new trial because the court found that petitioner had been guilty of "objectionable trial strategy" in several instances. (A. 11-18, *infra.*) At that time, the court "disqualifie[d it]self" from any further proceedings in the case. (A. 79.)

Some eight months later (October, 1966) the same judge [Robson], as a sort of addendum to his prior grant of a new trial, reentered the case, and summarily entered a judgment for $8,171.56 in costs and attorneys' fees, against petitioner personally, for "objectionable trial strategy." (A. 43-45, 83.)

The plaintiff's motion for costs and attorneys' fees was not filed until many months after the grant of the new trial, and the court's order disqualifying itself. (A. 81.)

Petitioner denied the charges, and demanded trial thereon, before a jury, or a different judge. ( A. 79, 82.) Both requests were denied. (A. 80, 83.)

Judgment was entered summarily, without any sort of evidentiary hearing, at which petitioner could confront his accusers, or present evidence corroborative of his statements of fact during trial. (A. 43-45; 83.) Nor were there any findings of fact and conclusions of law which might structure the appeal. (A. 11-18; A. 43-45.)

The first opinion of the Court of Appeals reduced the award against petitioner from $8,171.56 to $1,741.20, by eliminating the trial court's award of attorneys' fees, and deposition travel expenses.

But, it then increased plaintiff's recovery by allowing plaintiff's counsel their printing fees on appeal, $1,860.80, by remanding the case for an award to plaintiff of a sum up to one-third of their legal fees on appeal. (404 F. 2d 1163 at p. 1171; A. 19-36.) All of these awards were ordered against petitioner personally, and not against his client.

On remand the trial court [Decker] entered judgment for $1,741.20, pursuant to the directions contained in the opinion of the Court of Appeals. (A. 33, 46a.) That judgment and the judgment of $1,860.80, in printing costs, inserted in the mandate of the Court of Appeals, were paid at that time. (A. 46, 46a.) After a short hearing on the value of plaintiff's counsel's services on appeal, the court entered judgment for $4,000 in attorneys' fees. (A. 46, 46a.)* A $5,000 bond was set and filed.

On appeal those judgments were affirmed, on December 23, 1970. (A. 39-42.)

Petitioner seeks review and reversal of the three judgments: $1,741.20 ("costs"); $1,860.00, printing expense from first appeal; and $4,000.00, attorneys' fees. (*Infra*, p. A. 46, 46a.)

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* NOTE: This award is in addition to the $46,974.58 received by plaintiff's counsel out of the $117,436.47 paid to plaintiff, in the injury action.

**Petitioner.**

Petitioner is a trial lawyer in the City of Chicago, of very wide experience. Since his graduation in 1935 from the Harvard Law School, he has specialized in the representation of numerous insurance companies, in the defense of personal injury cases.* Thirteen sitting trial judges of both the state and federal Bench gave evidence of his honorable conduct and fairness as a lawyer. (A. 47-59.)

**Personal Injury Action.**

Donna Kiefel, plaintiff, was seriously assaulted in her hotel room at the Las Vegas Hacienda and sustained severe personal injuries. She sued Hacienda for $1,000,000. Her then husband, sued for loss of consortium, but his action was dismissed the morning of trial.

The Las Vegas Hacienda, defendant herein, was insured by one of petitioner's clients, The Royal Indemnity Company.

On their behalf petitioner acted as trial counsel in both trials.

**The Charges of Misconduct Against Petitioner.**

The first trial judge described the three critical questions in the injury case as follows (A. 12):

(1) Who inflicted the injuries, her husband or an intruder?

(2) If an intruder, did he gain entrance through plaintiff's contributory negligence by virtue of an unlatched

* NOTE: II Martindale-Hubbell Law Directory (1971), p. 81 (a. v.); Best's Recommended Insurance Attorneys (1969-1970), p. 225) (Petitioner is a member of the International Association of Insurance Counsel, and regularly represents some 20 major insurance companies, including the Royal Liverpool Group, on whose behalf petitioner was retained in this case).

door, or plaintiff's negligence due to intoxication, or other circumstance?

(3) Did the assault proximately result from defendant's negligence in failing to provide an adequate lock on the door, or in not maintaining sufficient security guard in the corridor?

In the same memorandum, the trial court said that it was allowing plaintiff's motion for a new trial because it felt, "the jury might or could have been influenced" by "objectionable trial strategy" of petitioner in the following three particulars (A. 15-17):

(1) Insinuating in his opening statement, and in cross-examination of Carl Kiefel, that the plaintiff and her husband had an altercation, which defendant would prove by the husband's statement to a telephone operator [Dixie Tracy], and then failing to make the promised proof.

(2) Failing to file the uncertified deposition of a defense witness [Hamlin].

(3) Precluding the court appearance at the Chicago trial, of Stella Butterfield, the Las Vegas court reporter, who took the Hamlin deposition and an out-of-court statement from Hamlin.

### 1. What the Record Shows as to Charge 1 (Failure to Prove Matter in Opening Statement).

Plaintiff was assaulted with a champagne bottle about 5:20 a.m. on March 1, 1962. It was one of four which had been sitting on a table in the room. She was in bed at the time.

Her husband testified that he was still down in the casino gambling.*

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* NOTE: Between the trials, the Kiefels were divorced. He did not testify in the retrial.

Pretrial investigation showed that between 2:00 and 6:15 a.m., he had made a series of about 14 attempted telephone calls from a booth in the lobby, to his room. The telephone operator [Tracy] asked him why he did not get a key from the desk. He replied that his wife had put the chain on, because they had had words, and he could not get in.

Plaintiff's counsel took the statements of the proposed witness before trial and her name was on the pretrial witness list.

On the morning of the opening of trial, Carl Kiefel was dismissed as a party to the suit. However, the pretrial order was not amended to delist the witness.

Petitioner therefore described, without objection, the Tracy evidence in his opening statement. (A. 60-64.) Further, he brought her from Las Vegas to Chicago, to testify.

Petitioner could not present her evidence, because the court had ruled, during another witness's testimony, that he would not permit anything Carl Kiefel said outside his wife's presence, to be shown.*

"The Court: To anything that he said the objection will be sustained."

Further, when petitioner had attempted to cross-examine Carl Kiefel about the conversation with the telephone operator, the court sustained objection.

Though Kiefel had been dismissed as a party to the suit, petitioner believed that Kiefel's declarations were still admissible under three well-established exceptions to the hearsay rule. Ample authority supports his actions. This

* NOTE: The maid, who admitted Kiefel to the room with her latchkey, after the occurrence, was barred from testifying that Kiefel had told her that he had given his wife the key, and directed her to leave the door unlocked for him.

authority was cited to the trial courts and Court of Appeals.*

All other matters in the opening statement were proved. Plaintiff herself admitted that the "light from the bathroom shone on his [the attacker's] face."

No objection was ever made to the opening statement until after verdict.

**2. What the Record Shows on Charge 2 (Failure to File Hamlin Deposition).**

After the occurrence, and while a hospital patient, plaintiff admitted to five different people that she had left the door unlocked, for her husband. One person to whom she made the statement was a nurse, Sharon Hamlin, who recorded the conversation in the hospital record.

Petitioner naturally wanted to present her as a witness, but it was uncertain whether she could come to Chicago to testify, since she was a young married woman with a baby. Accordingly, her deposition was taken in Las Vegas, before reporter Stella Butterfield on October 22, 1965. One of petitioner's partners, Frank Hall, flew out to Las Vegas and took the deposition. The place of the deposition was the office of Singleton, Delanoy & Jemison, a law firm which frequently represented the Royal Liverpool Group of insurance companies, petitioner's client in this case. See pp. 12, 13, *infra*.

Late in October, the reporter brought it to the deponent for signature, and it was signed. It was not certified, since Butterfield had forgotten her seal. Butterfield thus left it with Hamlin.

A few days later, on November 4, 1965, two days after

* NOTE: The section of our brief in the Court of Appeals listing the authorities on this point is reprinted in the Appendix, A. 65-66.

the start of trial, Hamlin came to Chicago, and had it with her, uncertified, and left it at petitioner's office.

She then went to her family home in Baltimore, Maryland. Twelve days later, on November 16, 1965, she testified in this case.

While she was gone, petitioner had the deposition returned to Las Vegas for certification.

Petitioner's statements to the court about the whereabouts of the deposition were corroborated by the testimony of Hamlin, as well as by the factual assumption of the plaintiff's counsel's questioning at the second trial.*

Further, petitioner had neither the right, nor the duty, under Rule 30 (e, f), A. 1, 2, to file the uncertified deposition. *Indeed, the rules do not contemplate that anyone, but the reporter, shall have or file the original of a deposition.*

It was never clear that the witness could stay away from Las Vegas long enough to testify. Her child was ill. She stayed away nearly two weeks before testifying. Rule 30(f), F. R. C. P., required that the deposition be certified and filed by the reporter (Butterfield), if it were to be used by petitioner as evidence.

### 3. What the Record Shows as to Charge 3 (Precluding the Court Appearance of Stella Butterfield).

Hamlin finally testified on November 16, 1965, the next to the last day of trial. Plaintiff's counsel, thereupon, sought unsuccessfully to bring Butterfield, the reporter, to

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* NOTE: The only apparent contradiction is contained in a deposition of Butterfield, taken months later out in Las Vegas, on another aspect of the case, by counsel who were unfamiliar with the precise question involved.

After the first trial, the deposition was shuttled back and forth in Las Vegas, between Mrs. Hamlin and Mrs. Butterfield, for review, resignature and certification. The deposition was not taken in a sufficiently systematic way as to detail the precise chronology of events.

Chicago from Las Vegas to impeach Hamlin about an out-of-court statement she was alleged to have given in September, 1965 at her house.* He wanted to put her on on the morning of November 17, 1965, the last day of the trial, as a rebuttal witness.

The post trial motion contained an affidavit by Jacobson [plaintiff's counsel] that he called Butterfield on the afternoon of November 16, 1965, asking her to fly east and testify, and that she agreed. About 9:30 p.m., the affidavit continued, she called back to say she had purchased her ticket, but that an attorney named Singleton refused to release her from a deposition set for the next morning. Jacobson's affidavit continues, that he then called Singleton at his home (about 10:30 p.m.) asking rescheduling of the deposition, and was flatly refused.

Petitioner categorically denied having anything to do with any of the foregoing events. (A. 82-83.)

His demands to cross-examine Jacobson and to present evidence corroborative of his denial were refused. (A. 82-83.)

Neither Singleton, nor Butterfield, ever testified. Butterfield, however, gave a deposition, before retrial of the case, in which she denied talking to Jacobson personally (only his office girl), denied purchasing a ticket (only checked the flight schedule), and denied agreeing to come to Chicago on November 17.

All she agreed was to try to find a substitute reporter for Singleton's previously-scheduled deposition. Unable to find a substitute reporter in Las Vegas, she asked the office of Singleton, Delanoy & Jemison to reschedule the deposition. They refused, she said, stating that it was "a very important case."

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* NOTE: the impeachment issue was simply whether two answers made by Hamlin in the tendered transcript were verbatim accurate. The witness had stated that the transcript, which she had never before seen, was "substantially correct."

It is uncontradicted that Jacobson never contacted petitioner, to inform him of the problem, and ask him to intervene with Singleton.

Nor did plaintiff's counsel move to obtain the reporter's [Butterfield] appearance on November 18 [a Friday], when it became apparent that she could not make it to Chicago by November 17 [a Thursday].* Indeed, even if Singleton had agreed at 10:30 p.m., Nov. 16, 1965, to Jacobson's request, it is doubtful that Butterfield could have flown to Chicago and testified before Friday, November 18.

Plaintiff's counsel, however elected to go to the jury on November 17, without her testimony.

Such other factual matters as are relevant are stated in connection with the several points urged for certiorari and reversal.

## REASONS FOR GRANTING THE WRIT; ARGUMENTS IN SUPPORT THEREOF.**

### 1.

### Impartial Court.

Review should be granted, because the decision below is in direct conflict with *Mayberry* v. *State of Pennsylvania,* No. 121, 91 S. Ct. 499, 39 L. W. 4133 (1/20/1971).

In *Mayberry,* a judgment of contempt was entered summarily at the end of trial. This Court reversed, holding that the practical and proper course would have been for

* NOTE: Under Illinois law, such an attempt, and a motion for mistrial, or at least to continue, is an absolute prerequisite to the grant of a new trial because of the absence of a witness. *Pinkstaff* v. *The Pennsylvania R. Co.,* 23 Ill. App. 2d 507, 507-24, 163 N. E. 2d 728 (1959), *affirmed* 20 Ill. 2d 193, 170 N. E. 2d 139 (1961), *cert. den.* 365 U. S. 878, 81 S. Ct. 1029 (1961); *Kendall* v. *Limberg,* 69 Ill. 355; *Clark* v. *Chicago Rys. Co.,* 192 Ill. App. 358, 360 (1915); *Casey* v. *Sawyer Biscuit Co.,* 163 Ill. App. 145 (1911); *Mastin* v. *National Tea Co.,* 278 Ill. App. 60 (1934); *Nehring* v. *Ricker,* 126 Ill. App. 262 (1906).

** Summarized *infra* at pp. 33-34.

the trial court to refer the charges to another judge. Quoting *Cooke* v. *United States*, 267 U. S. 517, 539, the Court stated (91 S. Ct. at 504, 39 L. W. 4136):

> "'* * * All we can say upon the whole matter is that where conditions do not make it **impracticable**, or where the delay may not injury public or private right, a judge called upon to act in a case of contempt by personal attack upon him, may, without flinching from his duty, properly ask that one of his fellow judges take his place.'
>
> "We conclude that that course should have been followed here, as **marked personal feelings** were present on both sides." (Emphasis supplied.)

This Court further stated (91 S. Ct. at 504, 39 L. W. 4136):

> "'* * * A judge cannot be driven out of a case. Where, however, he does not act **the instant** the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the **marks** of the unseemly conduct have left **personal stings** to ask a fellow judge to take his place. * * *'" (Emphasis supplied.)

Continuing, the Court emphasized (91 S. Ct. at pp. 504-505, 39 L. W. at p. 4136):

> "'* * * At times a judge has not been the image of **'the impersonal authority of law'** (*Offutt* v. *United States*, 348 U. S. 11, 17) but has become so **'personally embroiled'** with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.
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> "'* * * These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.' *Id.*, at 14.
>
> "'* * * 'Fair trials are too important a part of our society to let prosecuting judges be trial judges of the charges they prefer.' *Ibid.*"

Here, the "personal feelings" of the court [Robson] toward petitioner [Hubbard] were so strong that in granting the motion for new trial, the court had "disqualifie[d] it[self] from retrying the case. (A. 79-80.) Only months later, when the petition for costs and attorneys' fees was filed, did the judge [Robson] reintervene, to punish petitioner summarily.

The measure of the "personal involvement" and "marked personal feelings" of the trial court below, is indicated by the following quotation from the trial court's opinion, granting a new trial in the civil action, 39 F. R. D. 592, 596. (A. 17-18.)

> "* * * Counsel for defendant is a lawyer who has had long and extensive trial experience. These years in the court should have taught him compassion and a sense of fair play. Instead, he seeks to use his experience to assert and apply **every sly trick and stratagem** to win his case. He does this with the hope that he can stay within the bounds of professional ethics. In this instance, he has far overstepped the bounds. This court finds that his trial tactics were such that the jury might or could have been influenced by his unfair actions and as a result found for the defendant."

The statement was repeated by the Court of Appeals in 404 F. 2d 1163 at 1165.

Under *Mayberry* Judge Robson could not have summarily entered a contempt judgment of $8,171.56 **after** the civil trial, so "marked" were his "personal feelings," so "personally embroiled" was he with this trial lawyer, Reese Hubbard, your petitioner.

If the procedure of the court below is correct, the policy of the *Mayberry* decision, and many like it, will be frustrated completely, if an "angered" trial court simply changes the name of the proceeding, from "contempt," to "costs."

In *Mayberry,* there was a jail sentence of 11-22 years. Perhaps, this extreme sanction motivated the court to take

*Mayberry.* Lest it be contended, however, that its rule is governed by, and limited to such aggravated situation, the recent statement of Justice Blackmun and Chief Justice Burger in *Groppi* v. *Wisconsin,* 91 S. Ct. 490, 495, 39 L. W. 4150, 4152 [1/25/1971], is pertinent. "Nevertheless, **unfairness** anywhere, **in small cases as well as in large,** is to be **ferreted out.**" (Emphasis supplied.)

In *Mayberry,* the only impediment to a contempt judgment was the "marked personal feelings" of the trial court. There was no question as to what words defendant had uttered. There were no factual issues to be resolved by the taking of evidence concerning events which took place outside the courtroom.

By contrast, in the case below, apart from the "marked personal feelings" of the trial court, there was a further impediment to summary punishment of the petitioner. Resolution of the serious charges against petitioner turned on evidence of events which took place **outside** the presence of the court. (See pp. 18-22, *infra.*) It has long been well settled that summary punishment for contempt will not lie in any instance where, as here, "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *." *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 68 S. Ct. 499 (1948); *Cook* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925).

It is, of course, true that petitioner did not personally revile or insult the judge. But, the court reacted as if it had been personally vilified and insulted. Further, the charges, if sustained, were in a real sense the equivalent of personal insult.

Here, petitioner, a prominent and experienced trial lawyer, was made to appear to have: (1) **prevented** an important plaintiff's witness [Butterfield] from coming to Chicago to testify, and (2) to have **secreted** an important

deposition [Hamlin] during trial to prevent its use of cross-examination, and then to have **lied** openly to the court, during trial, about its whereabouts.

These charges absolutely enraged the trial court toward petitioner. These charges, if proven, we submit, were likely to provoke passion and "outrage" on the part of almost any court. 404 F. 2d 1163 at p. 1170, A. 31.*

In these circumstances, (1) because of the court's "marked," "personal feelings" about the charges, and (2) because their factual resolution required evidence of events which took place outside the courtroom, the trial court's only correct course, under *Mayberry* v. *Pennsylvania,* 91 S. Ct. at 499, 39 L. W. 4133, 4136 (1/20/1971), was to refer the petition, when it was filed, to another trier of fact, not bearing the "sting" of personal attack and having the "impersonal authority of the law", to determine if the charges were factually based. Indeed, the court had previously disqualified itself from retrying the civil case, presumably because of its personal feelings toward petitioner. (See pp. 5, 14-15, *supra.*)

Petitioner's timely request for trial of those charges, by a jury, or a different judge, was erroneously refused. A. ..... Because of the patent, direct, and substantial conflict between the judgments below and this Court's opinion in *Mayberry,* certiorari should be granted, and the judgment below set aside.

## 2.

## Evidentiary Hearing.

In denying petitioner's right to an evidentiary hearing and to confront his accusers, the decision is in conflict with this Court's decisions in *Willner* v. *Committee on Character*

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* NOTE: Well it may be that they amounted, if true, to an "obstruction of justice." See A. 6-7. *Cf.* Concurring opinion of Chief Justice Burger in *Mayberry* v. *Pennsylvania,* 91 S. Ct. at p. 506, 39 L. W. 4136.

*& Fitness,* 373 U. S. 96, 103, 105, 83 S. Ct. 1175, 10 L. Ed. 2d 224, 229, 231 (1963); *In re Oliver,* 333 U. S. 257, 259, 273, 275, 92 L. Ed. 682, 694, 695 (1948); *Greene* v. *McElroy,* 360 U. S. 474, 3 L. Ed. 2d 1377, 79 S. Ct. 1400 (1959). See also *Berger* v. *Calif.,* 37 U. S. Law Week 3247, 89 S. Ct. 540, 541 (1969); *Barber* v. *Page,* 390 U. S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1969); *Pointer* v. *Texas,* 380 U. S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965); *Holt* v. *Virginia,* 381 U. S. 131, 14 L. Ed. 2d 290, 85 S. Ct. 1375 (1965); *In re Oliver,* 333 U. S. 257, 273, 92 L. Ed. 682, 2694 (1948); *In re Ruffalo,* 390 U. S. 544, 20 L. Ed. 117 (1968); *In re Murchison,* 349 U. S. 133, 99 L. Ed 942, 75 S. Ct. 623. See also *Brotherhood of Loc. Fire & Eng.* v. *Bangor & Aroostock R. Co.,* 380 F. 2d 570, 581 (D. C. Cir. 1967).

If the record in the civil case could be used collaterally and conclusively, as the courts below have done, then the foregoing decisions, and *Mayberry,* No. 121, are wrong.

The trial court attempted to avoid the effect of the foregoing decisions, on a theory that his personal presence and "observation" of the events of the first trial, eliminated any requirements of a fair trial, of confrontation, or of an evidentiary hearing. The argument proceeds on some sort of analogy to the direct criminal contempt rule. (Rule 42a, F. R. Cr. Pr.; A. 4) That rule permits summary punishment if the court "**heard** the conduct constituting the contempt and it was committed in the **actual presence** of the court." (Emphasis supplied.) But, that principle, even in contempt cases, does not apply "if any element of the offense are not personally observed by the judge, so that **he must depend on statements made by others for his knowledge of these elements** * * *." (Emphasis supplied.) *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). In all other instances, there must be **a full evidentiary hearing.**

The prejudicial character of the court's failure to conduct an "evidentiary hearing" is most forcefully shown in connection with charge 3, namely that on November 16, 1965 petitioner caused a Las Vegas attorney, named Singleton, to refuse to release a Las Vegas reporter named Butterfield from a previously-scheduled deposition in another case [in Las Vegas], so that she could come to Chicago on one day's notice to testify in this case.* (See pp. 11-13, *supra.*)

This charge greatly angered the court. And, properly so. If proven, it might well have constituted a serious "obstruction of justice." 18 U. S. C., § 401, 18 U. S. C. 1503. A. 6, 7. But, petitioner categorically denied the carge.

**Ordinarily, a trial lawyer's statement of fact is taken at face value.** When it is not, an evidentiary hearing should be had. At such hearing, Singleton [the Las Vegas lawyer], Butterfield [the reporter], Hubbard [the petitioner], and Jacobson [the plaintiff's counsel], could have testified and been cross-examined.

Only at such a hearing could it be determined why Singleton refused to release Butterfield from a previously-scheduled deposition in another case. Only Singleton would know whether Hubbard [the petitioner] had contacted him on the matter. Only he could show the character of the deposition in the other case which he refused to continue. But, his evidence was never taken in this case.

Nor was Butterfield's. In a deposition later taken on another aspect of the case, she said Singleton told her he could not release her because of the importance of the previously-scheduled deposition. "It was an important deposition". (See p. 12, *supra.*)

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* NOTE: Significantly, plaintiff's counsel did not attempt to move for mistrial, or to continue the case one more day, to permit her to fly to Chicago to testify. (See p. 13, *supra.*)

Similarly, cross-examination of Jacobson [plaintiff's] might have closed the discrepancy between (1) his affidavit that the reporter Butterfield told him that she would come to Chicago to testify, and then reneged, and (2) her later deposition story, that she simply told him that she would come if she could get another reporter for Singleton's deposition of the next morning.

With respect to the charge of failure to prove matter in the opening statement, an orderly evidentiary hearing would have shown that the witness [Tracy] was brought to Chicago from Las Vegas, was in the courtroom, and was not presented because of the court's rulings as to her class of evidence.* (See pp. 8-10, *supra.*)

The remaining charge, of "improper tactics," relied on by Judge Robson, was that petitioner, Hubbard, had **secreted** the original of an uncertified deposition of a defense witness named Hamlin, and then lied to the court about its whereabouts. (See pp. 10-11, *supra.*) Petitioner claimed that he had sent it back to reporter Butterfield in Las Vegas, when he discovered the deposition had not been certified, because he thought he might have to use it as original evidence. (It was not clear until the last minute that the witness could be in Chicago to testify. Her testimony was not given until the next to the last day of the two-week trial.)

There is much contradiction and confusion in the civil record of the two trials, as to when and by whom the Hamlin deposition was returned to the reporter [Butterfield] in Las Vegas for certification. That confusion is vastly compounded by the *Butterfield* deposition, which was taken in

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* NOTE: We note that Tracy's name was still on the witness list at the time. No objection was made by plaintiff's counsel to any part of the opening statement, until after verdict.

All other matters stated in the opening statement were proved. (See p. 10, *supra.*)

Las Vegas months after the first trial by plaintiff's co unsel and which was directed to other aspects of the case. At an orderly, **evidentiary** hearing, **directed to the precise** ques- **tion,** Hamlin, Butterfield, and petitioner could have been asked explicit questions, by a court and opposing co unsel, **and** given **responsive, explicit** answers.

The proceeding below was far too unsystematic t to re- solve this serious charge made against petitioner. (See pp. 10, 11 and f.n., *supra.*)

**To represent his client effectively, a trial lawyer si imply has to have his words taken at face value, as to what tran- spires outside the courtroom.** Once a court begins to doubt the lawyer, in fairness to itself, in fairness to the la wyer [**and** his client], **and** as a simple matter of due pr ocess, the court ought then to conduct a proper eviden tiary hearing.

Petitioner was entitled to an evidentiary hearing o n the court's charges, after **advance, specific notice.** In *Re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1220, 20 L. Ed. 2d 117 (1968), in the course of a disbarment proceeding, an addi- tional charge 13 was added. This Court held that adding the new charge denied procedural due process: the lawyer was entitled to **prior** notice that the matter in Charge 13 would be considered a disbarment offense.

Had Hubbard been accorded an evidentiary hearing, with specific findings of fact and conclusions of law, as req uired by Rule 52, the appeal would have been structured b y the findings. Hubbard then could not have been faced with (1) **ex parte** statements from other cases, (2) un tried charges not listed in the post trial motion, and (3) un tried charges from the subsequent retrial before Judge De cker, F. R. C. P. 52, F. R. Cr. P. 42. (See pp. A. 2-3, 4.)

Irrespective of whether Rule 52 required specific fin dings of fact and conclusions of law in the order grantin g the

new trial [February 28, 1966], such findings were required when the court later [October 10, 1966] decided to use that collateral determination as the sole factual basis for its "costs" judgment against Hubbard.

The object of Rule 52, requiring specific findings of fact and law, is to define the issues for appellate review and for application of the doctrine of **res judicata.** (5 Moore, Federal Practice, § 52.05(5), citing committee report.)

The patent inadequacy of the trial court's opinion, as findings of fact, is perhaps best illustrated in connection with charge 3, towit, that petitioner prevented the appearance of Butterfield, by causing Singleton [the Las Vegas lawyer] to refuse to release her from a previously-scheduled deposition. (See pp. 11-13, 19-20, *supra.*)

If Singleton refused to continue his previously-scheduled deposition, because of its importance (perhaps it was court set), or if he did so, because of his acquaintance with the insurer herein (See p. A. 17), thinking it would help them, but without ever discussing the matter with petitioner, there can be no basis for a finding of misconduct on petitioner's part.

To warrant any proceeding against petitioner personally, he must necessarily have communicated with Singleton or his office after Hamlin testified on November 16, 1965, to request them to refuse to release Butterfield on November 17, 1965.

But, the court did not find that Hubbard actually did anything, The court, rather, avoids a finding, by using such evasive, but emotionally-colored, phraseology, as (39 F. R. D. at 596; A. 17):

(a) he "hamstrung plaintiff's counsel in precluding the appearance of an out-of-town court reporter to testify . . ."

(b) ". . . **indications are** that counsel [Hubbard]

manipulated matters so that the court reporter would not be available . . ."

(c) "It is therefore evident that **improper pressure could have been** brought to bear to preclude the release of the court reporter . . ." (Emphasis supplied.)

Such language is completely insufficient, as a "recitation" of "facts" under the foregoing rules.

**More important, such language is a patently inadequate circumlocution of the rule barring a court from punishing summarily if "any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for these elements * * *."** *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 2d 682, 695, S. Ct. 493 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). That rule is eroded to a nullity, by the judgment below.

If the trial court could find only that there "**could have been**" misconduct on petitioner's part, in respect to the refusal of the Las Vegas lawyer, Singleton, to release his reporter, Butterfield from a previously-scheduled deposition, then the court was powerless to proceed summarily.

It was required, as a matter of due process of law, either to dismiss the charge, or grant petitioner's timely request for an evidentiary hearing.

A finding that impropriety "could have" occurred (39 F. R. D. at p. 562; A. 17) will not support punishment, summary or otherwise, under our system of justice.

Nor will the statement quoted at 404 F. 2d at 1163, that petitioner "uses every sly trick and stratagem to win his cases." Certainly, it is not a finding or a certificate which "recite[s] the facts" within the foregoing rules. *Widger* v. *U. S.,* 244 F. 2d 103, 107 (C. A. 5, 1957); *Tauber* v. *Gordon,* 350 F. 2d 843, 847 (C. A. 3, 1965).

As the latter court pointed out (350 F. 2d at p. 845):

> "Such a **general characterization** of behavior over a seven day trial period is not specific enough to satisfy the requirement of Rule 42a . . .
>
> "This requirement is more than a formality. It is essential to disclosure of the basis of decision to permit **informed appellate review.**
>
> "But, counsel's enumeration of occurrences which, in his view after the event, afforded a proper basis for the contempt order cannot be substituted for the required specification by the trial judge * * *" (Emphasis supplied.)

3.

**Improper Use of Past Decisions.**

The decisions below are in conflict with *Gregory* v. *City of Chicago,* 394 U. S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 734. In relying for its fact finding on charges from the second trial and from several opinions in other cases, the Court of Appeals has engaged in just that type of change of theory at the review level which was condemned in *Gregory,* and in *Ruffalo,* 390 U. S. 544, 88 U. S. S. Ct. 1220, 20 L. Ed. 2d 117 (1968), discussed *supra,* p. 21.

Further, at a proper hearing, it could be shown that there was no basis for the inferences of a pattern of misconduct on petitioner's part, which was drawn by the courts below.*

The principal decision, used adversely, *Quality Molding Co.* v. *American Nat'l Fire Ins.,* 287 F. 2d 313 (C. A. 7, 1961), did not involve petitioner in either the trial or appellate court. (See A. 67, 76-78.) In the remaining cases, the course of trial procedure criticized was supported by ample local precedent. (See A. 71-74.) That the Court

* NOTE: As part of the appendix, A. 67-75, we attach a copy of pp. 39-47 of our brief in the Court of Appeals, describing each of those opinions and charges.

of Appeals in cases such as *Mangan* v. *Broderick & Bascom Rope Co.*, 351 F. 2d 24 (C. A. 7, 1951); and in *Neusus* v. *Sponholtz*, 369 F. 2d 259 (C. A. 7, 1966), elected to impose tighter restrictions on cross-examination which was designed to show interest or bias, than were sanctioned by petitioner's authorities, does not reflect on petitioner's **general or specific** character.

Petitioner's procedure in *Mangan* had been expressly approved by the Illinois courts in *Mokrzycki* v. *Olson Rug Co.*, 28 Ill. App. 2d 117, 124, 170 N. E. 2d 635 (1960). (Interest of employer of witness to recover for workmen's compensation benefits paid may be shown.)* Petitioner's procedure in *Neusus* was approved by 3 Wigmore on Evidence [3rd Ed. 1940], § 1023 ("Cross Examination to Self Contradiction, Without Extrinsic Evidence"]. See also *People* v. *Sorge*, 301 N. Y. 198, 93 N. E. 637, 639. (See A. 73-74.)

Whenever a court decides between competing lines of evidence law, a court is normally attempting to balance the relevance of a given line of evidence against the possible prejudice therefrom. Necessarily, all courts will not reach the same results in such cases.

But, the advocate's role (the trial lawyer's role) in such instances, is radically different from that of the reviewing court, faced with competing principles of evidence law. In our adversary system of jurisprudence, the trial lawyer is not only permitted, but, indeed, we submit, duty bound to his client, to rely on and urge his point of law as forcefully and effectively, as possible.

Petitioner represented some of the most important insurance companies in America for over thirty years, following his graduation from the Harvard Law School. His practice

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* NOTE: *Mangan* has subsequently been rejected as authority on this point by the Illinois courts. *Skalon* v. *Manning, Maxwell & Moore*, 127 Ill. App. 2d 145, 156, 262 N. E. 2d 146 (1970).

was heavy and intense. It was devoted almost exclusively to the defense of insurance companies in personal injury litigation. (See p. 7, *supra.*)

Thirteen sitting judges of the state and federal courts, before whom he has tried over 300 cases, gave affidavits attesting his honorable conduct and fairness as a lawyer. (A. 47-59.)

Further, numerous appellate court opinions have absolved petitioner of charges of misconduct. See *e.g., Skalon* v. *Manning, Maxwell & Moore,* 127 Ill. App. 2d 145, 262 N. E. 2d 146 (1970); *Hendler* v. *Wolozin,* 105 Ill. App. 2d 132, 245 N. E. 2d 74 (1969), *cert den.,* 396 U. S. 929.

Significantly, in each instance, the opinions below were offered as (1) evidence of a "pattern of misconduct" and as (2) legal authority for the courts involved to look outside the record to several past cases in which petitioner was counsel. In both instances the Illinois courts rejected the *Kiefel* opinions for all purposes. Indeed, in the *Hendler* case, the Appellate Court, after lengthy deliberation, refused to permit the opinions even to be filed as an additional authority to plaintiff's previously-submitted brief.

In each instance, the court correctly elected to decide the case before it, **on its own record.** So ruling, the court found no evidence of misconduct on petitioner's part, and, therefore, affirmed the judgments entered on verdicts in favor of petitioner's clients.

What more potent example could there be, of the prejudice to petitioner, from the improper, indeed, we submit, unconstitutional, action of Judge Robson and the Court of Appeals, in relying primarily on matters dehors the record from opinions in several past cases in which petitioner Hubbard had been defense counsel, as evidence of "objectionable trial strategy" in this case.

Certiorari should be granted to review this unprecedented, and we submit, dangerously unconstitutional procedure. References to past offenses, even if properly proven, has long been the subject of the most severe condemnation. See Comment, 78 Harvard L. Rev. 426 (1964); Comment, 70 Yale L. J. 763 (1961); 10 Rutgers Law Review 531, 532 (1956); 1 Wigmore on Evidence, § 57, p. 546; 3 Wigmore, Evidence, §§ 896-918 (3rd Ed. 1940). As this Court itself has observed, such matter is rejected as unconstitutional, not because it is totally irrelevant, but because it "**tends so to overpersuade** [triers of fact] as to prejudice one with a bad general record and **deny him a fair opportunity to defend against a particular charge.** * * *" *Michaelson* v. *U. S.*, 335 U. S. 469, 476, 69 S. Ct. 213, 93 L. Ed. 168, 174 (1948). (Emphasis supplied.)

The several past decisions cited against petitioner are subject to explanation. (A. 68-74.) Further, **they are not a substitute for an orderly, evidentiary hearing directed to specific factual issues.**

There was not the slightest semblance of due process in these proceedings against petitioner.

## 4.

## Attorneys' Fees.

The award of $4,000 of attorneys' fees is in direct conflict with this Court's decision in *Fleischmann* v. *Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

The judgment assessing one-third of all attorneys' fees in the three appeals is without foundation in American law and is in direct conflict with Rule 39(c, e) of the recently enacted Rules of Appellate Procedure, as well as with the recent decision of the Supreme Court in *Fleischmann* v.

*Maier Brewing Co.*, 386 U. S. 714, 87 S. Ct. 1404, 18 L. Ed. 2d 475 (1967).

On the strength of *Fleischmann* the Court of Appeals reversed Judge Robson's judgment by eliminating the item of plaintiff's fees in the trial court. But, nothing in the *Fleischmann* opinion remotely suggested that it was limited to attorneys' fees in the trial court.

Rule 39(c) extended the costs allowable on appeal to briefs. (A. 5.) Had counsel fees been within this Court's contemplation when it made such amendments, they could easily have been permitted.

Similarly, Rule 39(e) makes taxable in the district court the costs of the reporter's transcript, the bond premiums and the filing fee in the district court. (A. 5.)

The Court of Appeals was thus not authorized to direct the trial court to determine and tax one-third of all counsel fees on appeal. Nor did the trial court have authority to enter judgment for $4,000 pursuant on remand.

If the trial court was forbidden by the *Fleischmann* case from awarding trial attorneys' fees for "objectionable trial strategy," certainly it could not award appeal attorneys' fees for "objectionable trial strategy."

Nor will 28 U. S. C., § 1912 (A. 7) sustain the award. In *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 616, 16 L. Ed. 2d 131, 138-139, 86 S. Ct. 1018 (1966), this Court stated that "additional costs, **although not attorney's fees**, may be assessed against * * * the losing party under 28 U. S. C., § 1912." (Emphasis supplied.)

Normally, an award under 28 U. S. C., §1912 is made only when an appeal has been dismissed on motion as unsubstantial or frivolous. *Deming* v. *Carlisle Packing Co.*, 226 U. S. 102, 57 L. Ed. 140, 33 S. Ct. 102.

Where, however, as here, the judgment appealed from

is reversed or simply reduced, a court may not assess additional costs under this section, which is by its terms limited to "damages and costs on affirmance." (A. 5.) *Globe Construction Co.* v. *Brewer,* 197 F. 2d 707, 708-709. (C. A. 5, 1952.)

5.

**The Independence of the Bar.**

Certiorari should be allowed to review the unprecedented construction given to 18 U. S. C., § 1927, and to review the relationship of that statute, to a statute especially enacted to protect the independence of the bar. 18 U. S. C., § 401. See also, Rule 42a, F. R. Cr. P. (Criminal Contempt, Summary Disposition) (A. 4, 6, 9.)

That statute, 18 U. S. C., § 401, as it has always been construed, would stand as a bar to these summary proceedings against petitioner. *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). (See pp. 14, 16, 18, 23, *supra.*) If left to stand as precedent, the decisions below have the affect of nullifying that statute. 18 U. S. C., § 401.

Plaintiff made certain charges in a motion for a new trial. Petitioner denied those charges. The court refused petitioner the right to meet and disprove those charges. Petitioner made a timely motion for a jury trial, and before a different judge. That request was likewise refused.

18 U. S. C. § 401 (the current citation) was enacted, following the impeachment trial of Judge Peck, to restrict the contempt power of courts, so that it would not be used to discipline lawyers. We believe Congress intended to prevent the very thing done in this case.

The reviewing courts, when cases involving lawyers have come to their attention, always mention the historical fact

that this statute was passed especially to protect the independence of lawyers in the exercise of their profession. *Cammer* v. *United States,* 350 U. S. 399, 76 S. Ct. 456, 100 L. Ed. 474 (1956); *Re McConnell,* 370 U. S. 230, 82 S. Ct. 1288, 8 L. Ed. 2d 434 (1962); **reversing** 294 F. 2d 310 (C. A. 7, 1961); *DeParcq* v. *U. S. District Court for Southern Iowa,* 235 F. 2d 692 (8th Cir. 1956). The Courts emphasize the public policy reason for restricting the power of contempt by quoting the argument of Congressman Buchanan (350 U. S. 399, 406: **"The public have almost as deep an interest in the independence of the bar as of the bench."** (Emphasis supplied.)

In *Re McConnell* the Supreme Court reversed the contempt conviction of a lawyer who had been fined $100 for persistent interrogation of witnesses on an issue after it had been (erroneously) ruled out of the case by the trial judge. The lawyer stated: "We have a right to ask the questions, and we propose to do so unless some bailiff stops us." This Court said (370 U. S. 236):

> "The arguments of a lawyer in presenting his client's case strennously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. The petitioner created no such obstacle here.
>
> "• • • **An independent judiciary and a vigorous, independent bar are both indispensable parts of our system of justice.** To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the **least possible power adequate to prevent actual obstruction of justice,** and we think that that power did not extend to this case." (Emphasis supplied.)

In no sense did petitioner's conduct approach that of the trial lawyer in *McConnell.* The only matter stated in

the opening statement, which petitioner did not prove, was the substance of a conversation between a telephone operator [Tracy] and plaintiff's then husband. However, the court refused to permit the husband to be cross-examined about the conversation. Further, when petitioner tried to put on a maid [Carpenter], the court said it would not permit any statements by the husband, outside his wife's presence, to go into evidence.* (See pp. 8-10, *supra.*)

In marked contrast to the behavior of the advocate in *McConnell, supra,* p. 31, petitioner, properly, we submit, refrained from calling the operator, then available, to make an offer of proof, such as that which offended the trial judge in *McConnell,* 370 U. S. at 232. His deference to the court's ruling on this crucial evidence question was beyond criticism, as well as procedurally correct. Petitioner followed the example of the trial lawyer in *Bartholomew* v. *Davies,* 276 Ill. 505, 514-515, 114 N. E. 1017 (1917), rather than the example of the lawyer in the *McConnell* case.

If a judgment of this type could be entered against a lawyer, it would be a far greater threat to the independence of the advocate than the penalties attempted to be imposed in the *Cammer* and the *McConnell* cases.

Nothing said or done by Hubbard would constitute conduct within the power of the court to punish him for contempt, summarily.* The judgment under review is not a taxation of "costs" as that legal term is universally understood.

The rights of a court to enter judgment, without a trial, on the verity of its own observations is limited to matters within the contempt statute.

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* NOTE: The unproven charges relating to prevention or concealment or prevention of evidence, may well have charged an "obstruction of justice," but they required an evidentiary trial. (See pp. 18-23, *supra.*)

Summary punishment for contempt, moreover, will not lie in any instance where, as here, "**any elements of the offense are not personally observed by the judge, so that he must depend on statements made by others for his knowledge of these elements * * *.**" *Re Oliver,* 333 U. S. 257, 275, 92 L. Ed. 682, 695, 68 S. Ct. 499 (1948); *Cooke* v. *U. S.,* 267 U. S. 517, 69 L. Ed. 767, 45 S. Ct. 390 (1925). (Emphasis supplied.)

In enacting and interpreting 18 U. S. C. § 401, Congress and the Supreme Court were not just protecting the narrow professional interests of lawyers. They were defending our adversary system, which cannot exist without an independent bar.

28 U. S. C., § 1927 was not enacted to enable a federal court to curtail the independence of the bar by ignoring the limitations of 18 U. S. C., § 401, and F. R. Cr. P., p. 42, on its power to punish a trial lawyer.

In attempting to place its authority for this vast, unstructured expansion of judicial power on a theory of inherent power (p. A. 41), the decisions are in the face of a century of legal tradition to the contrary.

Review should be granted to determine if the courts have been wrong in this period in thinking that such power did not exist, and in thinking that 28 U. S. C. § 1927 and its predecessors did not enlarge the categories of allowable costs, and were not enacted to enable a court to curtail the limitations of 18 U. S. C., § 401, and F. R. C. P. 42 on its power to punish a trial lawyer. See *Motion Picture Patents Co.* v. *Steiner,* 201 F. 63 (2d Cir. 1912); *Gold Dust Corporation* v. *Hoffenberg,* 87 F. 2d 451 (2d Cir. 1937); *In re Realty Associates Securities Corporation,* 53 F. Supp. 1013 (E. D. N. Y. 1943); *Bone* v. *Walsh Construction Co.,* 235 F. 901. (S. D. Iowa 1916.)

## CONCLUSION.

A short, evidentiary hearing, at which Butterfield [the Las Vegas reporter], Singleton [the Las Vegas attorney], Hamlin, petitioner [Hubbard], and plaintiff's counsel [Jacobson] could have been examined and cross-examined would have resolved the very simple factual disputes of this case:

(1) Such a hearing would have shown when and by whom the Hamlin deposition was returned to Las Vegas for certification: to-wit, by petitioner's office during trial, or by Hamlin after trial. (Charge 2.)

(2) Such a hearing would also have shown whether petitioner [Hubbard] communicated with Singleton or his office on November 16 to urge him to refuse to release Butterfield from a scheduled deposition on November 17. (Charge 3.)

(3) At such a hearing Tracy (the operator) could have shown that petitioner brought her all the way from Las Vegas to Chicago to testify and that she actually in the courtroom to testify. (Charge 1.)

Moreover, such an evidentiary hearing, before another judge, was constitutionally required.

Petitioner is a widely-respected trial lawyer. Thirteen sitting judges of the state and federal courts, before whom he has tried over 300 cases, gave affidavits attesting his honorable conduct and fairness as a lawyer. (A47-59.)

He ought as a simple matter of fairness and due process to have been accorded an evidentiary hearing before a jury or different judge, to disprove the very serious charges made against him. The proceedings below are subject to the very same constitutional defects as those involved in *Wisconsin* v. *Constantineau*, No. 95, 91 S. Ct. 507, 39 L. W. 4128 [Jan. 29, 1971]. There, this Court stated (91 S. Ct. at 510, 39 L. W. 4129):

> "It is significant that most of the provisions of the Bill of Rights are **procedural**, for it is **procedure** that marks much of the difference between rule by law and rule by fiat.
>
> • • • • •
>
> "Where a person's good **name, reputation, honor**, or **integrity** are at stake because of what the government is doing to him, **notice** and **an opportunity to be heard** are essential. • • • Only when the **whole** proceedings leading to the pinning of an **unsavory label** on a person are aired can **oppressive** results be prevented." (Emphasis supplied.)

"Notice and an opportunity to be heard," here by way of an evidentiary hearing, are the first essence of the Due Process Clause. *Boddie* v. *State of Connecticut,* 39 L. W. 4294, 4295 (3/2/71).

These summary proceedings charging petitioner, a trial lawyer, with "objectionable trial strategy," are without foundation in rule, statute, and the constitution. They ignore a century of legal tradition, protecting the independence of the bar.

For the foregoing reasons, certiorari should be granted and the judgments for $1,741.20 in "costs," $1,860.00 in printing expenses, and $4,000.00 in attorneys' fees on appeal should be vacated, reversed and set aside.

Respectfully submitted,

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